much the same way as, I gather, it had previously been accepted by the same learned Judge in *Teh Say Mooi v. Tan Chor Leng*[3]. Nothing in this judgment therefore can in anyway affect the view of the law expressed in *Foong Kooi's* case.

Appeal allowed.

CHIEW KEK SENG v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Thomson, J.) July 10, 1950]

[Ipoh — Criminal Appeal No. 47 of 1950]

Penal Code, s. 304A — High degree of rashness — Death of a cyclist — Sentence of imprisonment substituted for a fine.

The appellant in this case was charged with rashly driving a motor vehicle and thereby causing the death of a cyclist in contravention of section 304A of the Penal Code. He was convicted and sentenced to four months' rigorous imprisonment.

Held, that as the appellant acted not merely rashly but with a very high degree of rashness, his conviction must stand, but under the circumstances of the case a sentence of fine should be substituted for imprisonment. **Kuan Choon Hin v. Public Prosecutor** (1) distinguished.

Obiter dicta: "In the existing law relating to road traffic there is no provision enabling a Court to suspend the driving licence of a person who is convicted under section 304A of the Penal Code although there is such a power to suspend on conviction for the less serious offence of dangerous driving under section 4(3) of the Motor Vehicles (Driving Offences) Proclamation. This is a serious defect which so far as I am aware does not occur in the law of any other civilised country, and to my mind it calls for immediate remedy on the part of the Legislature."

Case referred to:—

(1) *Kuan Choon Hin v. Public Prosecutor* (1939) F.M.S.L.R. 199.

CRIMINAL APPEAL from the Magistrate's Court, Ipoh.

H. T. Ong for the appellant.

B. J. Jennings for the respondent.

The facts of the case appear sufficiently from the judgment.

Thomson, J.: — The appellant in this case was charged with rashly driving a motor vehicle and thereby causing the death of a cyclist in contravention of section 304A of the Penal Code. He was convicted and sentenced to four months' rigorous imprisonment. Against the conviction and sentence he has now appealed.

The learned Magistrate has set out his grounds for his decision with care and lucidity, and in spite of the very persuasive argument that has been addressed to me by Mr. H. T. Ong, I find myself unable to differ from the conclusions at which he has arrived as to the appellant's guilt.

The facts of the case present little difficulty. The appellant was the driver of a 'Hillman' motor car which he was driving from Taiping to Ipoh with four passengers, three in the back seat and one beside him on the front seat. At the time of the accident, which occurred in broad daylight, he was proceeding along a straight stretch of road just north of Chemor at a speed of between forty and fifty miles per hour. He had just passed a motor lorry going in the opposite direction and when he had done so was presumably on his correct side of the road. Brake marks on the road indicated that about the time he passed this lorry he applied his brakes with considerable force but whether this was done in connection with passing the lorry or in connection with the events that happened immediately afterwards it is impossible to say. In front of him, proceeding in the same direction as himself, was the deceased cyclist who was riding just off or just on the tarred surface of the road, and in front of this cyclist were two boys riding on one bicycle. Coming in the opposite direction was a bus which had stopped to set down a passenger and was travelling slowly. As he passed the deceased cyclist appellant's car came into contact with his bicycle causing him to fall to the ground and sustain a fractured skull as a result of which he died. The appellant in the meantime had completely lost control of his car, it swerved from side to side, the near side back wheel was wrenched off and it came to rest on its hood on the grass verge on its off side of the road.

The defence, for what it was worth, was that just before the moment of impact the cyclist had turned to his off side, and that in consequence the appellant who would otherwise have avoided him was unable to do so. The learned Magistrate, however, to my mind rightly, rejected this defence and for reasons which he has set out and with which I agree came to the conclusion that even if the cyclist did alter his course unexpectedly he could not thereby have brought himself more than a few inches nearer to the car at the moment of impact than he would otherwise have been.

In my opinion, there is not the slightest room for doubt as to what happened. The appellant was driving a heavily loaded car at a speed which though not in itself dangerous was nonetheless considerable. As was shown by the subsequent behaviour of his car, he did not have it fully under control. And yet without

giving warning of his approach he attempted to overtake the cyclist in front of him, allowing at the very most a few inches of clearness. In doing so he acted not merely rashly but with a very high degree of rashness, and, that being so, his conviction must stand.

As regards sentence, the appellant is a first offender, and I am told that if he is to go to prison it will materially affect his future chances of earning his livelihood as an insurance agent. There is no suggestion of alcohol in the case and although there was present a high degree of rashness, nevertheless that rashness was attended with a certain amount of misfortune. I am reluctant to interfere with the learned Magistrate's decision on the question of sentence, but it is possible that he has been influenced in this regard by his opinion, with which I do not agree, that the facts in this case were more serious than those in the case of *Kuan Choon Hin v. Public Prosecutor, supra.* In that case the accused person 'was driving at a grossly excessive speed, having regard to the fact that he was travelling along a road which, according to the police evidence, was usually crowded' whereas here the appellant was travelling along a road where he was unlikely to encounter and did not in fact encounter a great deal of traffic. In all the circumstances of the case I have come to the conclusion, although as I have said with some reluctance, that the sentence of imprisonment imposed by the Magistrate should be quashed and that there should be substituted for it a fine of $800 or four months' rigorous imprisonment in default of payment.

Before departing from the case, there is one observation I feel called upon to make. In the existing law relating to road traffic there is no provision enabling a Court to suspend the driving licence of a person who is convicted under section 304A of the Penal Code although there is such a power to suspend on conviction for the less serious offence of dangerous driving under section 4(3) of the Motor Vehicles (Driving Offences) Proclamation. This is a serious defect which so far as I am aware does not occur in the law of any other civilised country, and to my mind it calls for immediate remedy on the part of the Legislature.

Appeal against conviction dismissed—Sentence of fine substituted for imprisonment.

CHEDIN MOHAMED HASHIM
v.
TEOH ONG THOR AND CHEW CHAN SENG.

[Orig. Civ. Juris. (Jobling, J.) May 3, 1950]

[Penang—Civil Suit No. 180 of 1949]

Damages for conversion of two lighters—Wrongful sale of mortgaged property—Whether mortgagee has right to sue.

In this case the plaintiff claimed damages from the defendants for conversion of two lighters which were mortgaged to him.

The facts were that on the 4th day of July, 1949, the Bailiff of the Magistrates' Court, Penang, in execution of a judgment obtained by the first defendant against one Mastan Maricar, seized the two lighters which were mortgaged to the plaintiff, sold the same on the 11th day of July, 1949, at a public auction as the property of the said Mastan Maricar and delivered them to the second defendant, the highest bidder at the auction, as the purchaser. The Bailiff gave evidence that the first defendant personally pointed out the two lighters in question and informed him that they were the property of Mastan Maricar against whom he had obtained judgment. There were two points before the Court for consideration: firstly, whether the mortgagee has the right to sue and secondly, whether the second defendant acquired a good title by purchasing at the Sheriff's sale.

Held, (1) that the mortgagee was a person with the right to possession and as such is entitled to maintain this action; (2) that as in the present case the first defendant personally indicated the goods of the plaintiff to the Bailiff and as they were not those of the execution debtor the sale was wrong and passed no title.

Cases referred to:—

(1) *Farrant v. Thomson* 5 B. & Ald. 826.

(2) *Morris v. Salberg* 22 Q.B.D. 614.

ACTION for damages in tort.

Khoo Soon Chee for the plaintiff.

C. O. Lim for the second defendant.

Jobling, J.: —The plaintiff in this suit claims damages from the defendants for conversion of two lighters. No appearance was entered for the first defendant, but the claim has been resisted by the second defendant, on whose behalf Mr. C. O. Lim appeared.

The facts that appear from the pleadings and the evidence are as follows:—

The two lighters claimed Nos. P.C. 466 and P.C. 349 together with others were assigned by an Indenture of Mortgage to the plaintiff by way of security for the payment of the sum of $8,300/- together with interest, which sum was to be repaid by six monthly instalments on the dates set out in the Mortgage Deed. This Mortgage Deed was duly recorded at the Harbour Master's Office on the 26th day of January, 1949. The Mortgage Deed contained a proviso entitling the plaintiff in default of payment of any instalment to seize and take possession of the mortgaged property and sell the same. On the 25th June, 1949, payment of the instalments was in arrear and mortgagee issued